

14 October 1959

*General Counsel Opinion on*

MEMORANDUM FOR: Assistant Executive Officer, DD/P

SUBJECT: Destruction of Clandestine Services Correspondence

OGC Has Reviewed

1. We have received your memorandum of 7 August 1959 on the above subject in which you ask our opinion on the legal definition of the term "records" as used in laws governing the maintenance and disposal of Government documents and request our guidance in the matter of practical administration in this field, in compliance with applicable laws, with respect to operational field correspondence.
2. We would like to say at the outset that we are in general accord with the interpretation of basic legal principles which is expressed in your submission. This problem is largely a practical one and to a great extent reduces itself to the handling of operational correspondence in a manner compatible with broad statutory objectives.
3. The basic legal situation in the area of Federal records management is well set forth in a recent Cabinet Paper (CP 59-58/4, dated 27 July 1959) on the removal of papers of a "personal-official" nature by retiring executives, a problem only indirectly related to the one at hand. We think it appropriate to provide excerpts from the paper at this point:

"Government owned documentary material which does not fall within the definition of records may be disposed of under R.S. 161 (5. U.S.C. 22) which provides in part:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for...the custody, use, and preservation of the records, papers and property appertaining to it."

"This statute, apparently enacted under the authority of the Congress to make rules and regulations respecting the 'Property of the United States' (Constitution, Art. I, Sec. 3, Cl. 2), seems to confer adequate authority upon department heads to dispose of records and papers appertaining to a department so long as such disposition is 'not inconsistent with law,' e.g., the Records Disposal Act, Executive Order 10501 or limitations relating to

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confidential information. Accordingly, if material does not fall within the definition of 'records' contained in the Records Disposal Act, as, for example, extra carbons or photostats of memoranda, and is not classified or confidential removal may be authorized under R.S. 161. Although the statute covers only the nine executive departments enumerated in 5 U.S.C. 1, the courts have tended to read parallel powers into the statutes governing the independent agencies.

"The definition of 'records' contained in the Records Disposal Act (44 U.S.C. 366) includes:

'... all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of the word "records" as used in sections 366-376 and 378-380 of this title.'

"Extra carbon copies and photostats are not records under this definition. Further, the definition confers some discretion on agency heads to determine whether material comes under it, and the legislative history of the act indicates that some discretion was in fact intended. The definition requires that two conditions must be met. First, it must be 'made or received by any agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government or because of the informational value of data contained therein.' Obviously cases may exist in which it is difficult to determine whether any particular document should be treated as a 'record' in the light of these requirements....

"Guidance as to the manner in which discretion is intended to be exercised is supplied by the emphasis placed in the Federal Records Act (44 U.S.C. 392, et seq.) upon the making and preservation of records for the purpose of documenting policies, decisions and

essential transactions of agencies and in order to protect the legal and financial rights of both the Government and persons affected by agency activities. Material necessary for such purposes is to be treated as 'records' and not be removed.

" . . . .

" . . . . The discretion conferred upon department and agency heads with respect to the classification of materials as records must place primary emphasis upon the importance of maintaining in the hands of the Government documentation of Government activity. However, if this purpose is effectuated, leeway remains for the treatment of papers as . . . non-record and, therefore, subject to being removed under R.S. 3161 if otherwise proper.

" . . . ."

#### 4. Turning to the practical problem of Clandestine Services

\* operational field correspondence: we find, after considerable search, no other type of communication in the Government which is analogous to this and, therefore, no previous statement of working principles which we can consider applicable, but taking the precepts expressed in the Cabinet Paper, together with those in various statements by the General Services Administration, and applying them to the facts of operational field correspondence, we come to the following view, which we trust will be adequate guidance for those who must administer records in the field of clandestine operations.

1? x 5. First of all, we consider "record," as used in the statutes, to apply only to documents containing data not recorded elsewhere, and therefore, there is not to be included in this definition more than one copy (or original) of a document or any document considered vital because it contains certain data, which data is incorporated or summarized elsewhere. Stated another way, a document which is considered "record" because it contains a given piece of data ceases to be "record" X whenever that piece of data is incorporated into some other document.

6. Secondly, we think that operational field correspondence, as distinguished from administrative correspondence (and, for other reasons, cables), is by and large to be considered non-record. For example, a project in final form as it goes forward for approval, would certainly be considered record. Yet it would appear that field correspondence transmitting data in support of, or bearing on, the formulation of the project, would not be "record" material since the vital information contained therein is set forth and consequently preserved in the basic project document. Because of the nature of this approval process, and that by which projects are carried out

and reported upon, the great majority of operational field correspondence consists either of data which is incorporated into summary reports or also the detailed recountings of day-to-day activities which, were it not for the distance involved, would in many instances not even be reduced to writing. At the very least, it would appear that the great bulk of this working level correspondence does not embody information which need be preserved for the purpose of documenting policies, decisions, and essential transactions.

7. Examples of types of operational field correspondence which we consider exceptions to the generalization stated in paragraph 6 (but not that in paragraph 5) above are those items which contain:

- ✓ (a) Information relating to controlled individuals (ranging from informants to staff employees) with respect to status, health, job performance, function, etc.;
- ✓ (b) Information which may be useful as evidence of oral or written contracts, commitments, or other obligations, whether with respect to individuals or organizations;
- ✓ (c) Information on occurrences in connection with which there may be a future claim by or against the Government;
- ✓ (d) Information on the dissolution of projects, especially as may bear on holdover ties with individuals or organizations or the management of vestigial project affairs;
- ✓ (e) Information on occurrences either of general historical significance or of lasting interest with regard to the development of the tradecraft or lore of the Clandestine Services.

8. Of course, the above list is not to be considered exclusive. Persons accustomed to dealing with operational data will recognize others. In this particular field, what is "record" will in the long run, for practical reasons, pretty much have to be what these persons consider vital and so identify. But a piece of data which is considered vital need only be preserved in one accessible document in order to comply with the law. The extent to which documents which are "non-record" under the above principles should be retained is not a legal consideration and therefore not within the province of this Office or, as we understand it, within the scope of your inquiry. We would, of course, be happy to give our views on specific managerial problems, and in any event, to be of any further help on the legal aspects you may desire.

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[Redacted]  
Office of General Counsel

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cc: Chief, Record Management Staff

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